Qui Su Lam & Ors v Superintendent of Land and Surveys Betong Division

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO Q-01(A)-27–01 OF 2017
ABANG ISKANDAR, MARY LIM AND HARMINDAR SINGH JJCA
22 MARCH 2018

Land Law — Acquisition of land — Compensation — Authorities refused to compensate land owners for a building on their acquired land on ground it was an illegal structure — Authorities argued approval of planning/local authority was not obtained for the building's construction as required under the Sarawak Building Ordinance 1994 ('the Ordinance') — Whether Ordinance only applied to 'town' and 'suburban' land and not to the acquired land which was 'country land' — Whether erection of building was also permitted under s 39A(1) and (2) of the Sarawak Land Code — Whether building was accordingly not an illegal structure and adequate compensation had to be paid for its acquisition

Following the compulsory acquisition by the Sarawak Government of a portion of the appellants' land, the respondent awarded the appellants various sums as compensation for the land itself, the crops upon it (the land was used for padi cultivation and as a fruit orchard) and for severance but rejected a RM288,000 claim for a building that had been erected on the land on the ground it was an illegal structure under the Building Ordinance 1994 ('the Ordinance'). In a land reference to the High Court pursuant to s 56(1) of the Sarawak Land Code ('the Code'), the appellants argued that the amounts awarded by the respondent were inadequate and that compensation should also have been paid for the building. After hearing evidence, the High Court increased the sums awarded for the value of the acquired land and for the severance, maintained the amount awarded for the crops but rejected the compensation claim for the building agreeing that it was an illegal structure as no approval or exemption was obtained from the planning or local authorities for its construction as required by the Ordinance and that therefore no compensation was payable for it under s 61 of the Code. In the instant appeal against the decision, the appellants argued that the Ordinance did not apply to the acquired land and that the approval of the local or the planning authority was not required for the construction of the building which was used as a farmhouse cum store to keep farming equipment, fertilisers, etc.

Held, allowing the appeal, setting aside that part of the High Court's order dismissing the claim for the building and ordering that the appellants be paid compensation for it in the sum of RM288,000:

(1) The High Court had clearly misdirected itself on the facts. The subject land fell outside the operation of the Ordinance. Following an amendment in 2001, the Ordinance applied to 'town and suburban lands' as specified in its First Schedule. But as the subject land was neither 'town' nor 'suburban land' but 'country land', the Ordinance did not apply to the subject land (see paras 17, 30 & 33).

(2) The erection of the building was also not in contravention of the Code. It was an implied condition under s 39A of the Code that the appellants were permitted to erect the building in question for the purposes explained by the appellants. The evidence showed that at the material time, the erection of the building and the use to which it was put fell within the terms of s 39A(1) and (2) of the Code. The building was consequently not an illegal structure (see paras 24 & 33).

(3) As the building was not an illegal structure, pursuant to art 13 of the Federal Constitution read with s 60 of the Code, the appellants had to be paid adequate compensation for the building. Since the two assessors were of the like view that a fair and reasonable compensation for the building was RM288,000, and this stood unchallenged, the said sum was awarded to the appellants as compensation for the building (see para 34).

[Bahasa Malaysia summary

Berikutan pengambilan tanah secara wajib oleh Kerajaan Negeri Sarawak terhadap sebahagian tanah perayu-perayu, responden mengawardkan kepada perayu-perayu pelbagai jumlah sebagai pampasan bagi tanah itu sendiri, tanaman di tanah tersebut (tanah tersebut digunakan untuk penanaman padi dan dusun buah-buahan) dan untuk pemutusan tetapi menolak tuntutan sebanyak RM288,000 bagi bangunan yang didirikan di atas tanah tersebut atas alasan ia adalah struktur haram di bawah Ordinan Bangunan 1994 ('Ordinan'). Dalam rujukan tanah kepada Mahkamah Tinggi berikutan s 56(1) Kanun Tanah Sarawak ('Kanun'), perayu-perayu berhujah bahawa jumlah yang diawardkan oleh responden adalah tidak mencukupi dan bahawa pampasan patut juga dibayar untuk bangunan tersebut. Selepas pendengaran keterangan, Mahkamah Tinggi menambahkan jumlah yang diawardkan bagi nilai tanah yang diambil alih dan bagi pemutusan, mengekalkan jumlah yang diawardkan untuk tanaman tetapi menolak tuntutan pampasan bagi bangunan dengan bersetuju bahawa ia adalah struktur haram kerana tiada kelulusan atau pengecualian diperolehi daripada perancangan atau pihak berkuasa tempatan bagi pembinaannya seperti yang dikehendaki oleh Ordinan tersebut dan bahawa oleh itu pampasan tidak dibayar untuknya di bawah s 61 Kanun tersebut. Dalam rayuan ini terhadap keputusan tersebut, perayu-perayu berhujah bahawa Ordinan tidak diguna pakai kepada tanah yang diambil alih dan bahawa kelulusan daripada pihak berkuasa tempatan atau perancangan tidak diperlukan bagi pembinaan bangunan tersebut yang digunakan sebagai

A rumah ladang yang juga stor untuk menyimpan perkakas perladangan, baja, dan lain-lain lagi.

Diputuskan, membenarkan rayuan, mengenepikan sebahagian perintah Mahkamah Tinggi menolak tuntutan bagi bangunan dan memerintahkan
B bahawa perayu-perayu dibayar pampasan untuknya dalam jumlah RM288,000:

(1) Mahkamah Tinggi telah dengan jelas salah arah dirinya atas fakta. Tanah tersebut terangkum di luar operasi Ordinan. Berikutan pindaan pada
C tahun 2001, Ordinan diguna pakai kepada 'town and suburban lands' seperti yang dinyatakan di dalam Jadual Pertamanya. Tetapi memandangkan tanah adalah bukan 'town' atau 'suburban land' tetapi 'country land', Ordinan tidak diguna pakai kepada tanah tersebut (lihat perenggan 17, 30 & 33).

D

(2) Pembinaan bangunan tersebut tidak bertentangan Kanun. Ia adalah syarat tersirat di bawah s 39A Kanun bahawa perayu-perayu dibenarkan untuk mendirikan bangunan yang dipersoalkan bagi tujuan yang dijelaskan perayu-perayu. Keterangan menunjukkan bahawa pada masa
E material, pembinaan bangunan dan penggunaannya seperti yang dinyatakan adalah terangkum dalam terma-terma s 39A(1) dan (2) Kanun. Bangunan oleh itu bukan struktur haram (lihat perenggan 24 & 33).

(3) Memandangkan bangunan bukan struktur haram, berikutan perkara 13
F Perlembagaan Persekutuan dibaca dengan s 60 Kanun, perayu-perayu perlu dibayar pampasan yang mencukupi bagi bangunan tersebut. Memandangkan kedua-dua penilai adalah berpendapat bahawa pampasan adil dan munasabah bagi bangunan tersebut adalah RM288,000, dan ini tidak dicabar, jumlah tersebut diawardkan kepada
G perayu-perayu sebagai pampasan bagi bangunan tersebut (lihat perenggan 34).]

Notes

For cases on compensation, see 8(2) *Mallal's Digest* (5th Ed, 2017 Reissue)
H paras 2345–2404.

Cases referred to

Superintendent of Lands and Surveys, Sarawak v Aik Hoe & Co Ltd [1966] 1 MLJ 243, FC (refd)

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Legislation referred to

Building Ordinance 1994 (Cap 8) ss 1(1), (2), (3), 2, 3, 8, 63(a), First Schedule, Second Schedule, Third Schedule
Federal Constitution art 13

Land Code (Cap 81) ss 39A, 39A(1), (2), 48, 56(1), 60, 61

Appeal from: Land Reference No SRA-15–1/4 of 2015 (High Court, Sri Aman)

Joshua Baru (Desmond Kho with him) (Kho Partners Advocates) for the appellants.
Evy Liana bt Atang (Mohd Adzrul bin Adzlan with her) (Legal Officer, Sarawak State Attorney-General's Chambers) for the respondent.

Mary Lim JCA (delivering judgment of the court):

[1] This is an appeal against a part of the decision of the High Court. The case concerns a claim for compensation following compulsory acquisition of the appellant's land. The appellant was not awarded compensation for a building that was erected on the acquired land because the building was considered an illegal structure under the Building Ordinance 1994 (Cap 8).

[2] We agreed with the appellant's submissions that the learned judge had fallen in error in arriving at his decision that the building was an illegal structure. We found that this was factually erroneous and therefore unanimously allowed the appeal, set aside the relevant part of the order of the High Court and, ordered compensation to be paid for the building. These are our reasons in full.

BACKGROUND FACTS

[3] The facts are as appearing in the grounds of the learned judge.

[4] The appellants were the registered owners of a parcel of land described as Lot 49 Block 12 Awik Krian Land District situated at Ulu Semurin, Saratok.

[5] Pursuant to a notification under s 48 of the Sarawak Land Code (Cap 81), published in the Sarawak Government *Gazette* on 27 January 2011, the government took possession of a portion of the appellant's land measuring 7,656 sqmt for the purpose of building 'Bangunan Pejabat RISDA, Sahagian Betong' ('subject land'). After the acquisition, the remaining portion of the land belonging to the appellants is now described as Lot 4194 Block 12 Awik Krian Land District.

[6] The Superintendent of Lands and Survey, Betong Division held an inquiry on 31 March 2011 to determine the compensation to be awarded to the appellants who were the objectors for the resumption or acquisition of the subject land. The appellants were paid total compensation amounting to

A RM282,665.92, comprising RM254,562 for the value of the land acquired, RM5,043.60 for the crops on the subject land and RM23,060.32 for severance.

B **[7]** The superintendent did not compensate the appellants for a building described as 'rumah burung walit' on the land acquired. By a letter dated 18 May 2011, the appellants accepted the award under protest. The appellants claimed that there was a building on the subject land which had commercial value of RM288,000. This value was not taken into account in the award and the appellants claimed for this amount.

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[8] Pursuant to s 56(1) of the Sarawak Land Code (Cap 81), the appellants required the respondent to refer their objections to the High Court for determination.

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[9] In the reference, the appellants claimed that the compensation awarded was inadequate in four respects: the value of the land, the value of the crops on the land, severance, and the building on the land.

E

[10] After hearing evidence from both parties, the learned judge found that the appellants had, on the principles established in *Superintendent of Lands and Surveys, Sarawak v Aik Hoe & Co Ltd* [1966] 1 MLJ 243, proved their claim that the award was inadequate. The learned judge proceeded to award higher compensation but only in relation to two of the four heads of claim: a sum of RM267,960 (instead of RM254,562) for the value of the subject land and a sum of RM54,775 (instead of RM23,060.32) for severance. The compensation for crops was maintained while the claim for compensation for the building was rejected.

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[11] In rejecting the claim for compensation for the building, the learned judge accepted the evidence of DW1, a valuer called by the respondent. DW1 had testified that the appellants were not entitled to compensation for the building because it was a 'rumah walit or rumah burung' which has no commercial value. DW1 also testified that the building was an illegal structure because the appellants did not have the requisite approval to construct the building.

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[12] At paras 22–29, the learned judge made the following findings:

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> 22. Section 39A(1) of the Land Code provides that whenever any land is alienated for agricultural purposes, the following implied conditions shall apply thereto: (a) that the land shall not at any time be used for any purpose other than agriculture; and (b) that no building shall be erected on the land other than a building or buildings to be used for one or more of the purposes for agriculture or one dwelling

house for the proprietor of the land or for his domestic servants or agriculture tenant. A

23. The Land Code was enacted as an Ordinance to make better provision in the law relating to land whereas the Building Ordinance was to amend, consolidate and to make further provisions concerning the laws relating to building in the State, and for purposes connected therewith. Under s 2 of the Land Code, 'agriculture purpose' includes the cultivation of any crop, market gardening, and the breeding and keeping of livestock and fish but does not include ornamental gardens or ornamental ponds and 'building' shall have the same meaning assigned to it in the Building Ordinance 1994. Under s 2 of the Building Ordinance, 'building' is defined to include any house, hut, shed or roofed enclosure whether used for human habitation or otherwise. B C

24. Section 1(1) of the Building Ordinance states that this Ordinance shall to the extent specified in the third column of the First Schedule come into operation in the areas specified in the first column of the Schedule. Under the First Schedule, this parcel of land came under the jurisdiction of the Saratok District Council and the date of its application was 1 November 2000. Subsection 2 states that the provisions of this Ordinance shall apply to any building other those specified under subsection (3). D

25. Subsection (3)(a) states that the Ordinance shall not apply to any building of the class referred to in the Second Schedule. Both the objectors and respondent did not submit that the building comes under sub-s 3(b), (c), (d) or (e) or under para (2) or para (3) of the Second Schedule. E

26. Paragraph (1) of the Second Schedule states that except for by-law 120 and by-law 215(2), the provisions of Parts VI and VII of the Building Ordinance By-laws specified in the Fourth Schedule to this Ordinance shall not apply to private dwelling houses, detached or demi-detached and terrace houses intended for single family occupancies. Part VI of the Fourth Schedule sets out the regulations in respect of 'Fire Alarm, Fire Detection, Fire Extinguishment and Fire Fighting Access'. Under para (1), the provisions of Parts VI and VII do not apply to private dwelling houses except for by-law 120 and by-law 215(2). F G

27. Reading the provisions of s 1 and the Second Schedule of the Building Ordinance, the provisions of the Ordinance and the regulations thereto apply to a building as defined in s 2 of the Ordinance except the provisions set out in Parts VI and VII of the Fourth Schedule. The building described as a 'rumah burung walit' comes within the definition of 'building' in s 2 of the Building Ordinance. Therefore the objectors were not exempt from complying with the provisions of the Building Ordinance. H

28. Although the objectors explained that they were unable to submit their application because they were informed that the government intended to acquire their land, they did not apply for exemption or from complying with the provisions of the Building Ordinance. Section 3(2) states that no person shall erect any building unless approval in respect of the site plan has been granted by the competent planning authority under s 8(4). Under s 8(1) of the Ordinance, no person shall erect any building without prior written permission of the local authority and sub-s (2)(a) says that any person who intends to erect any building I

shall submit to the local authority such plans and specification may be required by any by-law made under the Ordinance. They did not comply with these provisions.

29. Since they did not obtain approval or exemption from the planning authority or local authority for the building to be constructed on the land, it was an illegal structure on the land. The objectors could not benefit from the illegality or from the illegal structure on the land. It was correct for the respondent to reject the objectors' claim for compensation for the building constructed on the land.

[13] In essence, compensation was refused on the ground that the building was an illegal structure as there was non-compliance of the Building Ordinance 1994 ('the 1994 Ordinance'). The appellants are said to have erected the building without first obtaining the requisite approvals of the local authority under ss 3 and 8 of the 1994 Ordinance. That being so, the building is an illegal structure for which compensation cannot be made under s 61 of the Land Code.

[14] From the learned judge's reasoning as set out above, it may be readily discerned that while his Lordship was prepared to accept that under s 39A(1) of the Land Code, a 'building' may be constructed on the subject land since it was land alienated for agricultural purposes, the appellants nevertheless had to have building approval under the 1994 Ordinance before erecting the building. Since there was no approval, or even exemption from the planning authority or the local authority for the building to be constructed on the subject land, the court found that it was an illegal structure for which no compensation could be paid.

[15] In order to come to that conclusion, the learned judge had to first find that the 1994 Ordinance applied to the subject land. And, in this respect, the learned judge said that 'Under the First Schedule, this parcel of land came under the jurisdiction of the Saratok District Council and the date of its application was 1 November 2000. Subsection (2) states that the provisions of this ordinance shall apply to any building other those specified under sub-s (3)'.

[16] It is the submission of learned counsel for the appellants that the learned judge erred in his findings. The appellants maintain that the subject land was not under the operation of the 1994 Ordinance. Consequently, the building may be constructed on the subject land without the approval of the local or planning authority.

[17] Having examined the evidence, we must agree with the appellants that the learned judge had clearly misdirected himself on the facts. Contrary to the understanding reached by the learned judge, indeed, the subject land fell outside the operation of the 1994 Ordinance.

[18] We note that the respondent had attempted to take issue with the fact that the subject land was land alienated with express conditions imposed; the express conditions being that the land was intended for agriculture and specifically for the planting of paddy. Learned counsel for the respondent submitted that since 'the exclusive usage permitted under the special conditions of the land title' was for padi cultivation, a building used as a 'rumah walit' or 'rumah burung', by its very nature, will run afoul of that express or special condition.

[19] With respect, we find some difficulty in following that argument, especially since the respondent had not objected to payment of compensation for the crops that were planted on the subject land. In any event, when the relevant provisions of the Land Code are appreciated, it will be seen that the Land Code does not, without more, prohibit the erection of a building on agricultural land, even one with the express condition of planting *padi* or any other particular crop.

[20] This is apparent from the terms of s 39A of the Land Code of Sarawak which reads as follows:

> 39A Special Conditions implied on alienation for agricultural purposes
>
> (1) Whenever any land is alienated for agricultural purposes, the following implied conditions shall apply thereto:
>
> (a) that the land shall not at any time be used for any purpose other than agriculture; and
>
> (b) that no building shall be erected on the land other than a building or buildings to be used for one or more of the purposes specified or referred to in subsection (2).
>
> (2) The purposes referred to in subsection (1) (b) are the following:
>
> (a) agriculture;
>
> (b) ...
>
> (i) one dwelling house for the proprietor of the land or for his domestic servants or agriculture tenant;
>
> (ii) such other buildings as may be necessary for accommodating any domestic servants of the proprietor or of his agricultural tenant, or persons employed on the land in connection with the use of the land for agricultural purposes; and
>
> (iii) such non-resident buildings as may reasonably be required by the proprietor or his agricultural tenant for purposes connected with land used by them for agricultural purposes as may be approved by the Superintendent:
> Provided that the land shall be used predominantly for agricultural purposes.

A **[21]** We do not see any violation of s 39A as the subject land remained, at all times, as agricultural land. The appellants through the first appellant had testified that *padi* was cultivated on the subject land. It was however, developed into an orchard for the family. Fruit trees such as durians, *dabai*, *manga*, *manggis*, *langsat* were planted. As mentioned earlier, the respondent agreed to
B compensate for these crops.

[22] As for the building that was constructed, the appellants explained that the building was 'to facilitate the daily administration of the orchard'. This
C building described as a 'farmhouse cum store' was 'primarily used to store ... fertilisers and farm machinery including grass cutters, digging implements etc. It was also shelter for our visits to the farm'. The appellants also had plans to use the first floor of the building for 'swiftlet farming but were unable to submit our application to the appropriate authority for the relevant permits as soon after
D the building was completed we were informed that the government had plans to acquire our land thereat for a RISDA building'.

[23] In our view, that explanation and the evidence as seen from the valuation reports tendered, show that the building was erected within the terms
E of s 39A. Further, and this appears to have been overlooked by the learned judge, the building had yet to be used for swiftlet farming. The appellants had plans for its future use, and that was as far as the first floor of the building was concerned. But, that was abandoned when the appellants were told of the intended resumption.
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[24] We are also of the view that, at the time of the resumption by the government, the building and its use was within the ambit of s 39A. Section 39A(1) allowed the erection of a building on the subject land, and the
G building may be used for one or more of the purposes specified in sub-s (2). From the explanations of the appellants, we are of the view that the use to which the building in question was put fell well within the terms of s 39A(1) and (2). As pointed out earlier, even the learned judge accepted this to be the case.
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[25] Moving next to the matter of whether approval of the planning or local authority under the 1994 Ordinance was required. The learned judge was of the view that under s 2 of the 1994 Ordinance, 'building' is defined to include any house, hut, shed or roofed enclosure whether used for human habitation or
I otherwise. The present building would come within the definition. As a starting proposition, that would be correct.

[26] However, we find the learned judge's reliance on the application of the 1994 Ordinance to be erroneous.

[27] Section 1(1) of the 1994 Ordinance states: A

> 1(1) This Ordinance may be cited as the Building Ordinance 1994 and shall to the extent specified in the third column of the first Schedule come into operation in the areas specified in the first column of the said Schedule on the dates specified in the corresponding part of the second column of the said Schedule.

B

[28] Section 1(1) anticipates that the operation of the 1994 Ordinance is both area and time specific. In other words, the Ordinance may apply to different areas on different or same dates. In order to know the extent of the application or operation, one needs to check against the relevant columns in the First Schedule. C

[29] Section 63(a) of the 1994 Ordinance further provides that the First, Second or Third Schedules may be amended by Order made by the Yang Di Pertua Negeri. Vide The Buildings (Amendment of First and Third Schedules) Order 2001, published in the Sarawak Government *Gazette* Part II Vol LVI on 12 July 2001, the First Schedule to the 1994 Ordinance was amended 'by substituting the words 'urban areas' which appear under the heading 'Extent of Application in the third column of that Schedule and in respect of paragraphs (t), (g), (h), (i), U), (k), with the words 'town and suburban lands'.' D E

[30] Up to 12 July 2001, it would be sate to say that the 1994 Ordinance applied to the 'urban areas'; as identified in the First Schedule. The effect of the amendment in 2001 is that instead of applying only to 'urban areas' with effect from 12 July 2001, the 1994 Ordinance now applies to the 'town and suburban lands' specified in the First Schedule. F

[31] However, the subject land is neither 'town' nor 'suburban lands'. As seen in the title documents, the subject land is 'Country land'. This is further confirmed in the two valuation reports prepared in relation to the hearing before the High Court; one of which was prepared by the respondent. G

[32] Under the Sarawak Land Code (Cap 81), 'Country land' is defined as follows: H

> 'Country land' means land other than land declared to be town, suburban or land comprised in a bazaar; whether before or after the 1st day of January 1958.

[33] Since the subject land is country land, the 1994 Ordinance therefore does not apply. The erection of the building is also not in contravention of the Land Code. It is an implied condition under s 39A of the Land Code that the appellant is permitted to erect the building in question for the purposes explained by the appellants. The building erected on the subject land is I

consequently not an illegal structure, contrary to what was found by the learned judge.

[34] As the building is not an illegal structure, under art 13 of the Federal Constitution read with s 60 of the Land Code of Sarawak, the appellants must be paid adequate compensation for the resumption by the government. Since the two assessors were of the like view that a fair and reasonable compensation for the building is RM288,000, and this stands unchallenged, we are of the view that this sum of RM288,000 must be awarded to the appellants as compensation for the building.

[35] We had, therefore, unanimously, allowed the appeal with costs, set aside that part of the order of the learned judge dismissing the claim for the building and, ordered compensation of RM288,000 for the building. We had also ordered the deposit be refunded to the appellant.

Appeal allowed, part of the High Court's order dismissing the claim for the building set aside and the appellants ordered to be paid compensation for it in the sum of RM288,000.

Reported by Ashok Kumar